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We accordingly allow the appeal, set aside the order of the Court below, and restore the decree of the Court of first instance. The appellant will have his costs here and in the Court below.

*Appeal decreed.*

## APPELLATE CIVIL.

*Before Mr. Justice Richards and Mr. Justice Griffin.*

C. E GREY, OFFICIAL ASSIGNEE, (APPLICANT) *v.* HAZARI LAL (DECREE-HOLDER).*

1908 *July* 14.

*Civil Procedure Code, section 244—Official Assignee—Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment debtor paid to him—Appeal.*

*Held* that, the Official Assignee not being the representative of an insolvent judgment-debtor, no appeal would lie against the disallowance of his claim to have the proceeds of a sale in execution of a decree against an insolvent judgment-debtor paid over to him. *Kashi Prasad* v. *Miller* (1), *Sardarmal* v. *Aranvayal Sabhapathy* (2) and *Chandmull* v. *Ranee Soondery Dossee* (3) referred to.

THE facts out of which this appeal arose were as follows:—

One Hazari Lal obtained a decree against Dhani Ram and his son, Lachmi Narain on the 2nd of May 1907. In execution of this decree, property belonging to the judgment-debtors was sold on the 27th and 28th May 1907. The judgment-debtors were declared insolvent by the Calcutta High Court and vesting orders in respect of their property were passed in the case of Dhani Ram on the 17th May 1907 and in the case of Lachmi Narain on the 29th May 1907. The insolvents' schedules were not filed until the 7th April 1908. The appellant, who is the Official Assignee, applied to the Court below for payment to him of the proceeds of the sale. The Court below (Subordinate Judge of Cawnpore) relying on the ruling in the case of *Kashi Prasad* v. *Miller* (4) refused the application.

The Official Assignee thereupon appealed to the High Court.

* First Appeal No. 257 of 1907, from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 5th of August 1907.

(1) (1885) I. L. R., 7 All., 752.
(2) (1896) I. L. R., 21 Bom., 205.
(3) (1894) I. L. R., 22 Calc., 259.
(4) (1885) I. L. R., 7 All., 752.

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C. E. GREY OFFICIAL ASSIGNEE v. HAZARI LAL.

Munshi *Gulzari Lal* and Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondent.

RICHARDS and GRIFFIN, JJ.—The respondent decree-holder obtained a decree against Dhani Ram and his son, Lachmi Narain on the 2nd of May 1907. In execution of his decree, property belonging to the judgment-debtors was sold on the 27th and the 28th May 1907. The judgment-debtors were declared insolvent by the Calcutta High Court and vesting orders in respect of their property were passed in the case of Dhani Ram on the 17th May 1907 and in the case of Lachmi Narain on the 29th May 1907. The insolvents' schedules were not filed until the 7th April 1908. The appellant, who is the Official Assignee, applied to the Court below for payment to him of the proceeds of the sale. The Court below relying on the ruling of this Court in *Kashi Prasad* v. *Miller*(1) refused the application.

The Official Assignee comes here in appeal. An objection is taken that no appeal lies, on the ground that he is not the representative of the judgment-debtors within the meaning of section 244 of the Code of Civil Procedure and that this application does not relate to the execution, discharge or satisfaction of the decree and consequently no appeal lies.

The decision cited above is clearly in favour of this objection. That decision has never been overruled by this Court, and has been followed in the case of *Sardarmal* v. *Aranvayal Sabhapathy* (2) and *Chandmull* v. *Ranee Soondery Dossee* (3). With reference to these authorities we must sustain the objection and hold that no appeal lies. The result is we dismiss this appeal with costs.

*Appeal dismissed.*

(1) (1885) I. L. R., 7 All., 752. (2) 1(896) I. L. R., 21 Bom., 205.
(3) (1894) I. L. R., 22 Calc., 259.

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*July* 14.

*Before Mr. Justice Richards and Mr. Justice Karamat Husain.*

RAM DIHAL RAI AND OTHERS (DEFENDANTS) *v.* THE MAHARAJA OF VIZIANAGRAM (PLAINTIFF).*

*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 91--*Mortgage—Fixed rate tenant—Suit by zamindar to redeem a mortgage made by a fixed rate tenant on the death of the tenant without heirs.*

*Held* that the zamindar is not, within the meaning of section 91 of the Transfer of Property Act, 1882, a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of his holding made by a tenant at fixed rates who has died without heirs. *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1) referred to.

THIS was a suit brought by a zamindar to redeem a mortgage made by a fixed rate tenant. The plaintiff alleged that the fixed rate tenant had died without heirs and that his interest having thereby lapsed to the zamindar the plaintiff was entitled to redeem. The Court of first instance (Munsif of Ballia) found that in the event of the tenant having died childless his interest went to the Crown, and not to the plaintiff, and accordingly dismissed the suit. The plaintiff appealed. The lower appellate Court (Subordinate Judge of Ghazipur) reversed the decision of the Munsif and remanded the case for trial on the merits. Against this order the defendants appealed to the High Court.

Mr. *M. L. Agarwa'a*, for the appellants.

Dr. *Satish Chandra Banerji* (for whom Babu *Jagubandhu Phani*), for the respondent.

RICHARDS and KARAMAT HUSAIN, JJ.—This was a suit brought by a zamindar to redeem a mortage made by a fixed rate tenant. The plaintiff claimed that the fixed rate tenant had died without heirs and that accordingly he was entitled to redeem the mortgage. The Court of first instance, in what we think a well-considered judgment, dismissed the claim. The lower appellate Court reversed the decree of the Court of first instance and held that the plaintiff was entitled to redeem. The learned Judge commences by saying that the admitted facts of the case are that the tenancy was a fixed rate tenancy and that the tenant had died heirless. The lower appellate Court ought

* First Appeal No. 31 of 1908, from an order of Srish Chandra Bose, Subordinate Judge of Ghazipur, dated the 22nd of January 1908.

(1) (1876) L. R., 3 I. A., 92.

to be very careful in stating that facts are admitted unless they really are. This Court has to accept the findings of fact of the lower appellate Court. In the present case the onus of proving that the tenant died heirless lay upon the plaintiff, and we need hardly say that this was a onus which it would be extremely difficult for any plaintiff to discharge. We doubt very much whether the fact that the tenant died without heirs was ever admitted by the defendants. However, in the view which we take, this matter is not very material. In our judgment the tenancy did not lapse upon the death of the tenant without heirs. The tenancy has now vested in the Crown if the tenant died without heirs—*Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1). In order to redeem the person seeking redemption must have an interest in "the mortgaged property." The mortgaged property in the present case was the interest of a fixed rate tenant, and the mere fact that the zamindar has a proprietary interest in the land out of which the interest of a fixed rate tenant is carved does not give him "an interest in the mortgaged property" within the meaning of section 91 of the Transfer of Property Act.

Both parties admit that the same question as arises in this appeal arises in F. A. f. O. 33 of 1908 and that the same judgment rules both cases.

We allow the appeal, set aside the decree of the Court below, and restore that of the Court of first instance with costs in all Courts.

*Appeal decreed.*

(1) (1876) L. R., 3 I. A., 92.

1908
*July* 23.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

KASHI PRASAD AND ANOTHER (DEFENDANTS) *v.* INDA KUNWAR (PLAINTIFF).*

*Hindu law—Hindu widow—Widow in possession of husband's estate as inferior proprietor—Effect of enlargement of estate of inferior proprietor by action of Government—Mukaddam.*

An under-proprietor, whose status was described by the term "mukaddam," died, and his estate devolved upon his widow. Whilst this estate was in the possession of the widow, the Government proceeded to make a settlement with the mukaddams, excluding the superior proprietor, to whom an allowance by way of malikana was given. *Held* that the enlarged estate of which the widow thus became possessed was still a Hindu widow's estate merely: the action of Government had not the effect of making her a zamindar with a title independent of that which she derived from her husband. *Keech* v. *Sandford* (1) referred to by Stanley, C.J.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, and Dr. *Satish Chandra Banerji* for the appellants.

The Hon'ble Pandit *Sundar Lal* (for whom Babu *Jogindro Nath Chaudhri*) for the respondent.

STANLEY, C.J.—This appeal arises out of a suit for possession of a share in the village of Kanai Shibnagar in the district of Bareilly and for mesne profits. The facts are these. One Newal Rai was the owner of this as well as other property. He died before the year 1872, leaving a widow Musammat Jaika and two daughters, namely, Musammat Bilaso and Musammat Hulaso. One Banarsi Das purchased the property in suit at a sale in execution of a decree obtained against Musammat Jaika. The defendants Kashi Prasad and Basdeo Sahai are the brothers of Banarsi Das, who is dead. Five kachwansis of the property is in the possession of the defendants 3 to 8, and as to this portion the plaintiff's suit has been dismissed and we are not concerned with it in the present appeal. Musammat Jaika died on the 27th of November 1878, and after her death, her daughters Bilaso and Hulaso, sold ¾ of the property to Musammat Lachman and three others. A suit was brought by the vendor and vendees for possession of the village of Hafizpur, not the village in dispute, and

* First Appeal No. 276 of 1906 from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 15th of June 1906.

(1) (1726) 2 W and T, 7th edn. p., 693.

the suit was decreed on the 18th of May 1881, and on appeal the decree for possession was affirmed by the High Court. Musammat Hulaso died in the year 1894 and her sister Musammat Bilaso died on the 15th of September 1895. Musammat Hulaso left a son Majnun Lal, and he on the 15th of June 1904 sold the village in dispute to the plaintiff Musammat Inda Kunwar. The present suit was instituted on the 11th of December 1905, so that it was brought within 12 years from the deaths of Musammat Hulaso and Musammat Bilaso.

One of the defences set up was that the debt of Musammat Jaika, in respect of which the property was sold, was incurred for legal necessity. This defence was not established, and it has not been raised before us. Another plea raised was in regard to the $\frac{3}{4}$ of the property which was sold by Musammat Hulaso and Bilaso on the 8th of January 1881. The plea was that this sale was carried out for legal necessity and that the plaintiff, as legal representative of Majnun Lal, was bound by it. This is the subject of the connected appeal No. 280 of 1906.

As to the entire of the village the main and important defence was that the property was not the estate of Newal Rai and did not devolve on Musammat Jaika as his heir; that Newal Rai was only a *mukaddam* of the property, being recorded as lambardar, and that, after his death, the Government conferred proprietary rights on Musammat Jaika, and she thus acquired the absolute estate and did not inherit it from her husband, and that consequently Banarsi Das, who purchased the property at a sale in execution of a decree obtained against Musammat Jaika, acquired an absolute estate in it. This was the main contention before us of the defendants appellants.

The circumstances which led to the intervention of Government in regard to this estate were these. Raja Kheri Singh owned the village in dispute and a number of other villages as zamindar, but under him were inferior proprietors, who are described as *mukaddams*. Raja Kheri Singh made default in payment of the Government revenue, and in consequence the Government determined to make settlements with the under-proprietors and the under-proprietors engaged with the Government for the payment of the Government revenue, and a *malikana*

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allowance of Rs. 10 per cent. of the Government revenue was allowed to the Raja. The settlement was so made with Musammat Jaika after the death of her husband, and it is this settlement which forms the basis of the claim that Musammat Jaika by grant from Government became in her own right the absolute owner of the village in dispute with other property. It does not appear that any sanad was granted by Government to Musammat Jaika. The only evidence which has been laid before us on the subject is some records from the settlement department and also judgments of the Civil Courts. One of the records in question is a proceeding before the Settlement Collector of Bareilly, dated the 4th of September 1870, relating to a settlement of the village of Kanai Shibnagar (No. 58C of the record). In it the reason is assigned for the nomenclature of the village and successive transfers, and from it we gather that the village was populated by Hari Ram *mukaddam* about 300 years ago, that subsequently the village site was washed away by the floods of the Ram Ganga, and that it was afterwards populated by one Sewa Ram. Then follows this statement :—"At the time of the former settlement Ranis Rup Kunwar and Bas Kunwar, wives of Raja Kheri Singh, were the zamindars, and Ganga Ram, Khayali Ram, Gajadhar, Tilok Chand and Newal Rai, *mukaddams*, the lambardars of this village. After the settlement, Newal Rai died and in his stead the name of Musammat Jaika was entered as a lambardar." Then later on an order of the Lieutenant-Governor, dated the 24th of June 1851, is recited to the effect that the zamindari of this village was conferred upon certain persons, who are named, and amongst others as to 6 biswas, 13 biswansis and 5 kachwansis on Ganga Ram and Musammat Jaika. Later on we find the statement that on the 10th of March 1862, an order, together with a list of taluqdari villages of Raja Kheri Singh, was received from the Lieutenant-Governor to the effect that the *mukkaddams* should pay to the heirs of Raja Kheri Singh Rs. 10 per cent. of the Government revenue as *malikana* allowance.

In the khewat of the village of Kanai Shibnagar, dated the 8th of January 1870, there appears in the last column the following statement :—"There are two kinds of proprietors in this village, *i.e.*, one superior and the other inferior. As under the

order of the Government the inferior proprietors have been charged with the payment of revenue, the settlement of this village has been made with them. Raja Partab Singh, the adopted son of Ranis Rup Kunwar and Bishen Kunwar, widows of Raja Kheri Singh, has been declared to be the superior proprietor of this village. Rupees 134 on account of *malikana* allowance due to him shall, as per detail given in column 13, be paid into the Tahsil, and he will continue to receive it from the Tahsil treasury. He shall have nothing to do with the collections and assessments of the village."

It appears that the widows of Raja Kheri Singh instituted a suit as his representatives to recover zamindari and malguzari possession of the entire estate of Raja Kheri Singh, including 87 mauzas, and to set aside the decision of the Settlement Officer, dated the 24th of June 1851, by which the plaintiff's claim was rejected and the zamindari title of Ghulam Husain and others was recognized. The Judge of Bareilly decreed the plaintiffs' claim, whereupon an appeal was preferred to the Sadr Dewani Adaulat, and we have on the record a copy of the judgment of that Court, dated the 27th of August 1861. In that judgment a short history of the estate is to be found, and official reports are quoted as elucidating the fiscal history of the estate and the positions of the conflicting claimants. From this it appears that at the cession the name of Kunwar Kheri Singh was recorded as proprietor of the entire pargana, but that the first settlement was concluded generally with the *mukaddams*; that at the second settlement Kunwar Kheri Singh engaged for 21 villages, and at the third settlement for 26, but that owing to his incapacity and the fact that the revenue had fallen into arrears, Kunwar Kheri Singh was excluded from the settlement and a suitable provision was made for him as an equivalent for his exclusion from the management of the estate. The learned Judges held that the allowance in question was actually granted as a *malikana* allowance, and that the plaintiffs possessed a proprietary title to some extent in all the villages claimed, but that the defendants, who then engaged with Government for the 54 mukaddami villages were possessed of proprietary rights in these villages of a heritable and transferable nature. The conclusion at which the

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learned Judges arrived was, that in the case of the 54 mukaddami villages there existed an inferior proprietary right, heritable and transferable, which was vested in the defendants then engaging for these mauzas.

We gather from this that there was no actual confiscation by Government of the superior proprietary right of Raja Kheri Singh and no grant of that estate to the inferior proprietors. What the Government did was to settle for the revenue with the inferior proprietors reserving to Raja Kheri Singh in respect of his superior proprietary rights a *malikana* allowance. The inferior proprietors no doubt thus acquired zamindari rights which they had not previously enjoyed, but these rights were acquired by virtue of and not independently of their pre-existing estate. The inferior estate became as it were merged in the superior interest thus, I may say, usurped. Musammat Jaika had succeeded on the death of her husband Newal Rai to his estate, and was recorded in the revenue papers as lambardar. Then by virtue of the order of His Honour the Lieutenant-Governor to which I have referred she and Ganga Ram acquired zamindari rights in respect of 6 biswas 13 biswansis 5 kachwansis in the villages in question, of which Musammat Jaika was entitled to one-half. It is difficult to see how the accretion to her rights thus acquired can be regarded as equivalent to a grant by Government to Musammat Jaika in her own right of the estate which formerly belonged to her husband, so as to enable her to deal with it as her absolute property and disappoint the expectation of her daughters and the other reversionary heirs of her husband to whom the property would in the ordinary course have come upon her death.

The learned Subordinate Judge held that Musammat Jaika inherited the property from her husband, and did not in her own right acquire the zamindari rights which Government conferred. He observes as follows :—"It seems clear to my mind that as Musammat Jaika's name was entered in the revenue papers in respect of her husband's lambardari rights as heir of her husband, the zamindari rights in the shares in dispute were also conferred on her by Government as representing her deceased husband and as his heir, and she herself had done nothing to merit the

grant of zamindari rights to her, and she might never have acquired the zamindari rights had she not been heir and wife of Newal Rai deceased."

I think that the learned Subordinate Judge was right in the conclusion at which he arrived. Musammat Jaika acquired the property of her husband for a Hindu widow's estate, and by virtue of her ownership derived from her husband acquired from Government the zamindari rights which had not previously been enjoyed. The acquisition of these must, I think, be taken to be an enlargement merely of the interest to which she was entitled as the widow of Newal Rai, and as such be treated as acquired for the benefit of all persons interested as reversioners in the estate of Newal Rai. Even if the act of Government amounted to a grant of the zamindari rights to Musammat Jaika, it appears to me that the doctrine of graft which is so fully dealt with under the leading case of *Keech* v. *Sandford* (1) would be applicable. The rule laid down in the principal case is that when a trustee of lease-hold property renews the lease in his own name, he must hold the renewed lease for the benefit of his *cestui que trust*. This rule has been extended and it is applicable to the case of a purchase of the reversion of an estate by a tenant for life, and is based in such case upon the duty which lies upon a limited owner to act in a matter of the kind for the benefit of the whole interest. The principle is embodied in the Indian Trusts Act, 1882. Section 90 of that Act prescribes that "where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property gains any advantage, he must holb for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage." Here Musammat Jaika, who inherited from her husband his estate as tenant for life acquired from Government

(1) (1726) 2 W. and T., 7th Edn, p. 693.

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the zamindari rights which had belonged to Raja Kheri Singh by virtue of her position as qualified owner, and thus gained an advantage in derogation of the rights of the other persons interested in the property. Consequently she was bound to hold the advantage so gained for the benefit of all persons so interested. If she had not been tenant for life of the property of her husband, Government would undoubtedly not have settled with her for the revenue. It was by virtue for her possession of the estate as his widow, and not otherwise, that she obtained the concession of zamindari rights from Government. If therefore there was a grant from Government to her, she became I think, a constructive trustee of the rights so acquired for the parties entitled to the whole interest.

For the foregoing reasons I would dismiss the appeal.

BANERJI, J.—I also am of opinion that the appeal should be dismissed. In my judgment the effect of the settlement with Musammat Jaika was to enlarge the widow's estate which she held as heir to her husband Newal Rai. As such widow she held a life estate in the rights of Newal Rai as mukaddam. When the Government made a settlement with her and Ganga Ram, the brother of Newal Rai, it only enlarged the mukaddami rights held by them. So that the enlarged rights were held by her in the same capacity in which she held the original rights, namely, as a Hindu widow. I see no reason to assume that absolute rights as proprietor were conferred on her by Government. She was not therefore competent to make the transfer in suit. I express no opinion on the question of graft or on the question whether she may be deemed to have been a trustee for the persons entitled to the estate.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

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July 24.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

RAM CHANDAR (DEFENDANT) *v.* KALLU AND OTHERS (PLAINTIFFS).*

*Act No. IV of* 1882 *(Transfer of Property Act), section* 91*—Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband.*

*Held* that the reversionary heirs of the deceased husband of a Hindu widow in possession as such of her husband's property are not persons who, within the meaning of section 91 of the Transfer of Property Act, 1882 have such an interest in the mortgaged property, as would entitle them during the life-time of the widow to redeem a mortgage made by the husband.

THE facts which gave rise to this appeal are as follows:—Diwan Singh mortgaged certain property to one Durga. The mortgagor died leaving a widow Musammat Ram Dei, who took possession of the property. The mortgagee sold his interest to one Ram Chandar. The present suit was brought by the person who would have been the reversionary heirs of Diwan Singh had the widow died at the date of its institution, and they asked to be allowed to redeem the mortgage made by Diwan Singh. The Court of first instance (Munsif of Khurja) gave the plaintiffs a decree, and this decree was, with some modification, affirmed by the Additional District Judge. The defendant mortgagee appealed to the High Court.

Mr. *Muhammad Raoof*, for the appellant.

Lala *Girdhari Lal Agarwala*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The question raised in this appeal is whether persons who claimed to be reversionary heirs of a deceased mortgagor can, during the life-time of the mortgagor's widow, redeem a mortgage executed by the deceased. Diwan Singh was the mortgagor, and he executed the mortgage in question in favour of one Durga. His widow Musammat Ram Dei, is now in possession of the property. Ram Chandar, the defendant appellant, is a purchaser from Durga. No authority is shown for the proposition that a reversionary heir, who may or may not according to the circumstances ever come into possession of an estate, is entitled to redeem. The plaintiffs have no present interest in the property. Their interest is contingent upon their surviving the mortgagor's widow. The Court of

* Second Appeal No. 486 of 1907 from a decree of J. H. Cuming, Additional Judge of Aligarh, dated the 29th of January 1907, affirming a decree of Ganga Prasad, Munsif of Khurja, dated the 10th of September 1906.

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first instance gave a decree for redemption and directed that on payment of the mortgage debt the plaintiffs should be put into possession. Now it is obvious that the plaintiffs have no right to possession in the life-time of the mortgagor's widow. Therefore this provision of the decree is clearly wrong. Upon appeal the learned District Judge affirmed the decision of the Court below, with this modification that he directed that the provision in the decree awarding possession to the plaintiffs should be struck out. Notwithstanding this direction we find in the decree the same provision for possession. In it, it is stated that in the event of payment of the mortgage debt by the plaintiffs they shall be put into possession of the mortgaged property. On turning to section 92 of the Transfer of Property Act, it is obvious that the provisions of that section cannot be complied with, if the suit is one by reversionary heirs, as is the case here, seeing that they are not entitled to possession of the mortgaged property and may never be so entitled. That section also provides that if payment is not made of the mortgaged debt in accordance with the earlier provision of the section, the plaintiff is to be absolutely debarred of all right to redeem the property or that the property be sold. This provision would be inapplicable to the case of plaintiffs who are only reversionary heirs and who may ultimately never become entitled to the property. It would not be binding upon other parties who upon the death of the widow would become actually entitled to it as heirs. The plaintiffs respondents rely upon the language of section 91 (*a*) as giving them a right to redeem. This section provides that any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property may redeem, and the contention is that the plaintiffs-respondents have such an interest. We think that the interest there referred to is a present interest and not a mere contingent right such as the plaintiffs possess. In view of the difficulty of carrying out a decree for redemption in a case of the kind, particularly in cases in which persons are entitled to an interest in the property for life in succession, as for instance the widow of a deceased mortgagor and after her the daughters of such mortgagor, we do not see our way to extend the meaning of the word "interest" as used

widow of her life estate. For these reasons we allow the appeal. We set aside the decrees of both the lower Courts and dismiss the suit with costs in all Courts.

*Appeal decreed.*

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*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

1908
*July* 31.

MUJIB-ULLAH (JUDGMENT-DEBTOR) *v.* UMED BIBI, (DECREE-HOLDER).*

*Execution of decree—Limitation—Application in continuation of previous proceedings in execution.*

On the 7th December 1903, the sale of certain immovable property, which had been attached, was ordered. On the 30th January 1904, the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held* that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Jogendra Chandra Sen* (1) distinguished. *Rahim Ali Khan* v. *Phul Chand* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of Aikman, J. The facts of the case are stated in the judgment under appeal, which was as follows:

AIKMAN, J.—This appeal arises out of an application to execute a decree for money passed upwards of a quarter of a century ago. As the learned District Judge remarks, the case "illustrates in a remarkable manner the protracted nature of proceedings in execution of a decree in those cases where the judgment debtor is not anxious to pay off the amount decreed." The decree was passed on the 14th May 1880. Various applications were made for execution, and some portion of the decretal amount was realized. On the 30th of June 1899 the decree holder presented an application to realize the balance due under

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* Appeal No. 9 of 1908, under section 10 of the Letters Patent.

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All., 482.

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the decree by attachment and sale of certain immovable property. The judgment-debtor pleaded that the application was barred under the provisions of section 230 of the Code of Civil Procedure. The Court of first instance overruled the objection, but on appeal, the District Judge sustained it. The decree holder appealed to this Court which on the 20th of June 1902 reversed the order of the lower appellate court and restored that of the court of first instance, treating the then application as one in continuation of the previous application, which was within time, but which had proved abortive owing to the institution of a suit to set aside a sale. This Court accordingly remanded the case under the provisions of section 562 of the Code of Civil Procedure to the court executing the decree. When the order of this court was received in the court below, the application of the 30th June 1899 was restored to its original number in the register and a date fixed for the sale of the property. The sale did not come off on the date fixed owing to objections filed by the judgment-debtor as to the amount due under the decree. These objections were finally disposed of on the 10th of September 1903. On the 7th December 1903 the Court ordered the sale of the property which had been attached to recover the amount found to be due from the judgment-debtor. On the 30th of January 1904 the Amin reported that he had been unable to hold the sale as there were no bidders. On the 1st of February 1904 intimation of this was ordered to be given to the decree-holder. On the 3rd February 1904 the Court recorded an order to the effect that, notwithstanding intimation, the decree-holder had not proceeded with the case or paid in fresh process fees for proclamation of a second sale, or deposited the costs of the Amin, and ordered the decree-holder to pay the necessary fees by the 10th February, stating in its order that no further time would be allowed. On the 10th February the Court recorded an order to the effect that, no fees having been paid, it appeared that the decree-holder did not wish to proceed with the case, which was accordingly ordered to be struck off "for the present," costs being awarded against the decree-holder. The decree-holder took no further steps until the 13th of January 1906, when he put in an application asking that the property

which, it appears, was still under attachment and which had not been sold previously owing to the absence of bidders, might now be sold. Objection was taken by the judgment-debtor on the ground that the application was a fresh application and was beyond time. This objection was overruled by the learned Subordinate Judge, who held that it was not a fresh application but merely one to revive the preceding application. On appeal the learned District Judge took the same view, holding that the present application was merely in continuation of the former. The judgment-debtor comes here in second appeal. The case has been well argued by the learned vakil who appears to support the appeal, but after considering the authorities cited by him I see no ground for differing from the conclusion arrived at by the courts below. On behalf of the appellant reliance is placed on the decision in *Dukhiram Srimani* v. *Jogindra Chandra Sen* (1) the facts of which are somewhat similar to those of the present case. There is this material distinction, however, that in the case relied on the application under consideration was made upwards of four years after the previous application. Here there was no doubt considerable delay on the decree-holder's part, and if he had taken no steps for three years I should have held the application to be barred. The respondent here had obtained an order for the sale of certain property. That order was not carried out, but this was for no fault of the decree-holder. He now asks that the previous order for the sale of the property, which is still under attachment, should be carried out. I think therefore that the present application must be deemed to be in continuation of the previous application. This view seems to me supported by what was said in the Full Bench case of *Rahim Ali Khan* v. *Phul Chand* (2) and the observations of the Privy Council in *Raja Muhesh Narain Singh* v. *Kishanund Misr* (3) at page 337 of the judgment. For these reasons I am of opinion that the appeal fails and I dismiss it with costs.

On this appeal

Dr. *Satish Chandra Banerji*, for the appellant

(1) (1900) 5 C. W. N., 347 (2) (1896) I. L. R., 18 All., 482.
(3 (1862) 9 Moo., 1 A., 324.

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Maulvi *Muhammad Ishaq* (for whom Babu *Sital Prasad Ghosh*), for the respondent.

STANLEY, C.J.—The question in this appeal is whether an application for execution made on the 13th of January 1906, is barred by the provisions of section 230 of the Code of Civil Procedure. Both the lower Courts, as also a learned Judge of this Court, have held that it is not so barred. The circumstances of the case are somewhat peculiar. It is an order of the 10th of February 1904, upon which the real question in my opinion turns. It appears that an application for execution was made by the decree-holder, and the property was attached and directed to be sold. A proclamation for sale was issued, but the sale proved abortive owing to the absence of bidders. Thereupon the decree-holder was required to pay amin's fees and also the fees for a further sale notification. It seems to me that this was not a proper order in view of Rule 388 of the Rules of Court of the 4th April 1894. That rule provides, amongst other things, that no fee shall be chargeable for serving or executing any process issued a second time in consequence of an adjournment made otherwise than at the instance of a party. Now the adjournment in this case was not at the instance of the decree-holder. It was rendered necessary by the fact that no bidders attended at the sale, and therefore, in the absence of authority to the contrary, I should be prepared to hold that the Court was not justified in requiring the decree-holder to pay further fees. The decree-holder did not pay further fees within the time fixed, notwithstanding that several opportunities were given him for the purpose of making such payment. In consequence of his default the order of the 10th of February 1904 was passed. By that order, after stating that the decree-holder had not deposited auction fees in spite of demands, it was directed that the execution case should be for the present struck off the list of pending cases, the decree-holder to pay the costs of execution. It seems to me upon the language of this order that it amounted to nothing more than a direction that the proceedings should remain in abeyance for the time being. It was not a final order disposing of the execution application. If this was not so, the words 'for the present' would be meaningless. In this view it appears

to me that the case is not similar to that of *Dhukiram Srimani* v. *Jogindra Chandra Sen* (1), which has been relied upon by Dr. *Satish Chandra Banerji*, in which it was held that a subsequent application was not a continuation of a previous application for execution "inasmuch as there was a clear break in the continuity by reason of the decree-holder's omission to deposit the costs for service of a fresh sale proclamation and thereby the previous proceeding came to an end." Here the previous proceeding did not come to an end, but was kept in abeyance. It appears to me that the case more nearly resembles that of *Rahim Ali Khan* v. *Phul Chand* (2). For these reasons I think that the application of the 13th of January 1906, was a proper application and was rightly granted. For these reasons I would dismiss the appeal.

BANERJI, J.—I also would dismiss the appeal. The decree in this case was passed on the 20th of May 1880. The application made on the 13th of January 1906 would therefore be barred under the provisions of section 230 of the Code of Civil Procedure, if it could be treated as an application for execution within the meaning of that section. A previous application for execution had been made within 12 years from the date of the decree, and if the proceedings which took place in pursuance of that application were not determined by reason of the Court dismissing the application, the present application might properly be regarded as an application in continuation of the previous application. The question whether the present application is a fresh application for execution turns on the meaning and effect of the order of the 10th of February 1904, by which the proceedings in execution under the previous applications were terminated. That order directs the execution case to be removed from the list of pending cases "for the present." The Court must have used the words "for the present" with some purpose. It did not order the property which had been attached to be released from attachment. The use, therefore, of the words "for the present," seems to indicate that what the Court intended was only to keep the execution proceedings in abeyance to be renewed again. Under these circumstances the application of the 13th

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All, 482

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of January 1906, may be reasonably assumed to be an application for the revival of the proceedings which had been kept in abeyance by the order of the 10th of February 1904. In the Full Bench case of *Rahim Khan* v. *Phul Chand* (1) it was held that a subsequent application will not necessarily be deemed to be a fresh application for execution, if by reason of objections on the part of the judgment-debtors or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution could not be obtained. In the present instance, it seems, the decree-holder was not bound, having regard to Rule 388 of the Rules of the 4th of April 1894, to pay fresh fees for the issue of a proclamation of sale a second time. There was therefore no default on his part and the proceedings were not terminated in consequence of his omission to do something which he was bound to do. That, in my opinion, is another reason why the subsequent application of the 13th of January 1906, should not be treated as a fresh application for execution. It should be held to be, as it purported to be, an application in continuation of the previous application for execution. For these reasons I agree with the learned Judge of this Court from whose judgment this appeal has been preferred in holding that the application for execution is not barred.

By THE COURT.—The order is that the appeal be dismissed with costs.

*Appeal dismissed.*

(1) (1896) I. L. R., 18 All., 482

1908
*August* 4.

*Before Mr. Justice Karamat Husain and Mr. Justice Griffin.*

PACHKAURI RAM AND OTHERS (PLAINTIFFS) *v.* NAND RAI AND ANOTHER (DEFENDANTS).*

*Civil Procedure Code, sections* 508 *et seqq—Arbitration—Award—Award set aside—Court not empowered to make a second reference on the same submission.*

The parties to a suit pending in the Court of a Munsif referred the matters in dispute between them to arbitration. An award was made and delivered: but it was afterwards discovered that one of the plaintiffs had died before the termination of the arbitration proceedings, and the Munsif accordingly set aside the award. *Held* that the Munsif had no power to make a second order on the same agreement of the parties again referring to arbitration the matters in dispute between them.

THE facts of this case are as follows:—

The suit out of which this appeal has arisen was brought for recovery of possession of a plot of land. The suit was referred to arbitration on the 4th of March 1907. The arbitrators submitted their award on the 2nd of April 1907. On the 11th of April 1907 objections were filed by the defendant. One of the objections was that one of the plaintiffs had died and that his heirs had not been brought on the record. The Court (Munsif of Ghazipur) on the 20th of April 1907, set aside the award and sent back the case to the arbitrators for decision, giving them time up to the 4th of May 1907.

The arbitrators made a fresh award and the Munsif passed a decree in accordance with that award. The defendants appealed and the appellate court (Subordinate Judge of Ghazipur) sent the case back under section 562 of the Code of Civil Procedure. From that order the plaintiffs appealed to the High Court.

Mr. *M. L. Agarwala,* for the appellants.

Babu *Beni Madho Ghosh,* for the respondents.

KARAMAT HUSAIN, J.—The suit out of which this appeal has arisen was brought for recovery of possession of a plot of land. The suit was referred to arbitration on the 4th of March 1907. The arbitrators submitted their award on the 2nd of April 1907. On the 11th of April 1907, objections were filed by the defendants. One of the objections was that one of the plaintiffs had died and that his heirs had not been brought on the record. The learned Munsif on the 20th of April 1907, set aside the

* First Appeal No. 113 of 1907 from an order of Srish Chandra Bose, Subordinate Judge of Ghazipur, dated the 10th September 1907.

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award and sent back the case to the arbitrators for decision, giving them time up to the 4th of May 1907. He said :—"The arbitrators have submitted their award. It is objected to on the ground, *inter alia*, that one of the plaintiffs had died during the arbitration and before the award, hence the award is illegal. I am of opinion that this contention must prevail. The plaintiff Gopichand died two weeks before the 12th of April 1907. The arbitrators not only delivered and made the award on the 2nd of April 1907, but they examined witnesses on the 1st of April 1907, *i.e.*, after the death of one of the plaintiffs. Of this fact (*i.e.* the death of one of the plaintiffs) the other plaintiff, the defendants, and possibly the arbitrators, could not have been ignorant. Hence the award is defective, as the representatives of the deceased plaintiff had not been brought on the record before the case was heard and award made by the arbitrators. Under these circumstances the ruling in *Chetan Charan Das* v. *Balbhadra Das* (1) would not apply. The award must therefore be set aside. As the representative of the deceased plaintiff has been brought upon the record and he agrees to the submission, it is ordered that the award of the 2nd of April 1907, be set aside and the case be sent back to the arbitrators for decision. The arbitrators are given time up to the 4th of May 1907, to make their award."

The arbitrators made a fresh award and the learned Munsif passed a decree in accordance with that award. The defendants appealed and the learned Subordinate Judge sent the case back under section 562 of the Code of Civil Procedure. The plaintiffs have preferred an appeal from that order.

It is contended on their behalf that the Court of first instance was competent to refer the case again to the arbitrators; that its action amounted to a remission under section 520 (*c*) of the Code of Civil Procedure, and that no appeal lay to the lower appellate Court.

There is no force in these contentions. The learned Munsif in express terms set aside the award of the 2nd of April 1907, as his order of the 20th of April 1907, and his judgment of the 15th of May 1907, show, and I cannot construe his order of the

(1) (1899) I. L. R., 21 All., 314.

2nd of April 1907, to mean that he remitted the award under section 520 (*c*). No objection to the legality of the award was apparent on the face of it. The learned Munsif could not, therefore, remit it under section 520 (*c*). See *Nanak Chand* v. *Ram Narayan* (1). His finding that the arbitrators examined the witnesses after the death of one of the plaintiffs and his remarks that the ruling in I. L. R., 21 All., 314, does not apply, clearly show that he, acting under section 521 (*a*), set aside the award of the 2nd of April 1907, and it is too late to discuss now that he, in the absence of an express finding that the arbitrators had knowledge of the death of Gopi Chand, was not justified in setting the award aside. He did set it aside, and both the parties submitted to that order, and they cannot attack that order at this stage of their litigation. It is, however, argued that the award of the 2nd of April 1907, in consequence of recording evidence after the death of one of the plaintiffs was waste paper, that the Munsif ignoring it could, on the basis of a subsisting agreement to refer to arbitration (see I. L. R., 27 Mad., 112), refer it to arbitration again. No section of the Code of Civil Procedure is quoted in support of this argument, and the help of the inherent powers of a Court of justice is invoked to legalize the action of the Court. This argument is of no use. Because after setting aside the first award the power of the learned Munsif to refer the matters in dispute was exhausted.

When a matter in difference has once been referred to arbitration, the Court by section 508 is precluded from dealing with it, save in accordance with the provisions of succeeding sections, and none of them confers upon that Court a power to refer the matters in difference again to arbitration. The inherent powers of a Court of Justice in opposition to the express provisions of section 508 of the Code of Civil Procedure are of no avail.

For the above reasons I would hold that the order of the lower appellate Court is right and would dismiss the appeal with costs.

GRIFFIN, J.—The question is not to my mind free from doubt, but I am not prepared to differ from the conclusion arrived at by my learned colleague. I concur in the proposed order.

(1) (1879) I. L. R., 2 All., 181.

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BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

1908
*August* 4.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

RAM KALI (DEFENDANT) *v.* JAMMA AND ANOTHER (PLAINTIFFS). *

*Act (Local) No. II of* 1901 *(Agra Tenancy Act), section* 22*—Occupancy holding—Succession—"Male lineal descendant"—Illegitimate son—Hindu law.*

*Held* that the illegitimate son of a man belonging to one of the Sudra caste by a kept woman, or continuous concubine, was capable of succeeding to the occupancy holding of his father as a "male lineal descendant" within the meaning of section 22 of the Agra Tenancy Act, 1901. *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1), *Sarasuti* v. *Mannu* (2) and *Hargobind Kuari* v. *Dharam Singh* (3) referred to.

ONE Mahtab Singh, an occupancy tenant, had a son Ghansham Singh, by a concubine with whom he had lived for a considerable period, Musammat Jamuna. Mahtab Singh died, and on his death Jamuna and Ghansham Singh applied in the revenue court for the entry of their names in respect of Mahtab Singh's occupancy holding. Their application was refused, and they accordingly brought the present suit, in which they asked for a declaration that Jamuna was the wife and Ghansham Singh the son of Mahtab Singh and that as such they were entitled to succeed to Mahtab Singh's occupancy holding. The court of first instance (Munsif of Chandausi) decreed the claim and this decree was in appeal upheld by the Additional Judge of Moradabad. The defendant appealed to the High Court.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Iswar Saran* for the appellant.

Babu *Durga Charan Singh* (for whom Babu *Beni Madho Ghosh*), for the respondents.

STANLEY, C.J., and BANERJI, J.—The question in this second appeal is whether the plaintiff respondent, Ghansham Singh, who is the illegitimate and only son of one Mahtab Singh, deceased, by a concubine who had lived continuously with Mahtab Singh, is entitled to the occupancy holding of his father as

* Second Appeal No. 355 of 1907, from a decree of W. F. Kirton, Additional Judge of Moradabad, dated the 19th December 1906, confirming a decree of Kunwar Sen, Munsif of Chandausi, dated the 6th of June 1906.

(1) (1869) 13 Moo., I. A., 141. (2) (1879) I. L. R., 2 All., 134.
(3) (1884) I. L. R., 6 All., 329.

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a male lineal descendant within the meaning of that expression as used in section 22 of the Agra Tenancy Act. The Courts below have rightly held that Mahtab Singh belonged to the Sudra caste.

Both the lower Courts held that the plaintiff was so entitled. We think that their decision is right. In *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1) their Lordships of the Privy Council held that the illegitimate children of the Sudra caste, in default of legitimate children inherit their putative father's estate. In *Sarasuti* v. *Mannu* (2) Pearson and Oldfield, JJ., held that the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra, and that the illegitimate son of an *ahir* by a continuous concubine of the same caste took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's life-time. In *Hargobind Kuari* v. *Dharam Singh* (3) Straight, O. C. J. and Duthoit, J., held that, according to Hindu law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for such payment. Hindu law differs from the English law in so far that it does not treat an illegitimate son as *filius nullius*. His status as a son in the family is recognised and his right to maintenance secured to him.

On the foregoing authorities, therefore, we think that it was rightly held in the Courts below that the plaintiff Ghansham Singh is entitled, in the absence of a legitimate son, to the occupancy holding of his father as a male lineal descendant. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1869) 13 Moo., I. A., 141. (2) (1879) I. L. R., 2 All., 134.
(3) (1884) I. L. R., 6 All., 329.